

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
No. 4:02-CR-60-5H
No. 4:10-CV-195-H

NIGEL CLARKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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ORDER

This matter is before the court on remand from the Fourth Circuit. Before the court are the following motions filed by petitioner:

- 1) Motion for Relief Pursuant to Rule 60(b), [DE #631];
- 2) Motion for Relief Pursuant to Rule 60(b), [DE #638];
- 3) Motion to Restore Rights to Appeal, [DE #645];
- 4) Motion to Stay Pending Rule 60(b) Motion, [DE #648]; and
- 5) Motion to Delete the Improper Claim Submitted in the August 2016 Rule 60(b), [DE #649].

COURT'S DISCUSSION

On August 22, 2016, petitioner filed a motion pursuant to Rule 60(b). [DE #631]. On March 23, 2017, petitioner filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence. [DE #638]. On June 9, 2017, this court dismissed both motions as

unauthorized successive 28 U.S.C. § 2255 motions.¹ [DE #639]. On July 17, 2017, petitioner filed a notice of appeal. [DE #641].

On December 4, 2017, the Fourth Circuit found the August 2016 motion contained viable Rule 60(b) claims and petitioner should be afforded the opportunity to elect between the Rule 60(B) and § 2255 claims in his August 2016 motion prior to its dismissal. [DE #646 at 3]. Further, the Fourth Circuit found the March 2017 motion was a Rule 60(b) motion and improperly construed as a successive § 2255 motion. Id. Therefore, the Fourth Circuit vacated this court's order dismissing both motions; affirmed this court's denial of petitioner's motion to unseal his presentence report; and remanded for further proceedings. Id. at 3-4. The mandate of the Fourth Circuit issued on January 26, 2018, [DE #650].

In consideration of the Fourth Circuit's review of petitioner's appeal on July 17, 2017, the motion to restore rights to appeal, [DE #645], is hereby MOOT.

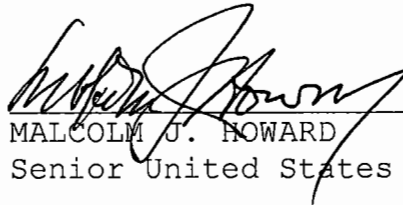
In accordance with the mandate of the Fourth Circuit, petitioner's motion to amend his August 2016 Rule 60(b) motion, [DE #649], is hereby GRANTED, and petitioner's August 2016 motion, [DE #631], will be construed as a Rule 60(b) motion according to petitioner's selection.

¹ This court's order also denied petitioner's motion to unseal his presentence report. [DE #639].

In light of the filing of petitioner's motion to amend his Rule 60(b) motion, petitioner's motion to stay the Rule 60(b) motion for purpose of amendment, [DE #648], is hereby MOOT.

The government is directed to respond to petitioner's amended August 2016 motion, [DE #631], and March 2017 motion, [DE #638], within 30 days of the entry of this order. Petitioner may file a reply within 30 days of the entry of responses by the government.

This 27th day of February 2018.



MALCOLM J. HOWARD

Senior United States District Judge

At Greenville, NC
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